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The Religious Freedom Restoration Act: Establishment, Equal Protection and Free Speech Concerns

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THE RELIGIOUS FREEDOM RESTORATION ACT: ESTABLISHMENT, EQUAL PROTECTION AND FREE SPEECH CONCERNS

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The passage of the Religious Freedom Restoration Act (RFRA) has been perceived by the majority of civil rights groups as a victory. At least in form, it fits the civil rights model. RFRA is an express limitation on the power of government to act when that action interferes with the rights of an individual. It requires that any burden on religious exercise must be supported by a compelling state interest—a test that when applied in constitutional jurisprudence has proved to be a most stringent protection.[1]

Moreover, anybody committed to the cause of civil liberties could only be delighted at RFRA's rejection of *Employment Division v. Smith*,[2] a decision which not only abandoned the compelling state interest test in free exercise analysis,[3] but also laid

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1. *See* Palmore v. Sidoti, 466 U.S. 429 (1984) (holding state interest in protecting child from private bias generated by living with an interracial couple was not compelling) (equal protection); Texas v. Johnson, 491 U.S. 397 (1989) (holding state interest in protecting the flag was not compelling) (speech); Roe v. Wade, 410 U.S. 113 (1973) (holding state interest in protecting fetal life before the second trimester is not compelling) (privacy).

2. 494 U.S. 872 (1990).

3. Even prior to *Smith*, however, the actual application of the compelling interest test in the free exercise context was less than substantial. The Supreme Court's record had been to deny all free exercise claims brought before it in all but two separate circumstances. The first instance involved free exercise exemption claims from unemployment insurance requirements—a matter which the Court felt the need to visit and revisit four times. *See* Frazee v. Illinois Dep't. of Employment Sec., 489 U.S. 829 (1989); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987); Thomas v. Review Bd., 450 U.S. 707 (1981); Sherbert v. Verner, 374 U.S. 398 (1963). The other instance was the Court's idiosyncratic decision in *Wisconsin v. Yoder* holding that the Amish were entitled to constitutional exemption from compulsory education laws. 406 U.S. 205, 234 (1972). *See* Nadine Strossen, *"Secular Humanism" and "Scientific Creationism": Proposed Standards for Reviewing Curriculum Decisions Affecting Students' Religious Freedom*, 47 OHIO ST. L.J. 333, 388-89 (1986) (explaining that the *Yoder* decision was "firmly anchored" to the special circumstances of the Amish faith).

That the Court engaged in a less-than-rigid application of the compelling interest standard in the cases decided prior to *Smith* is perhaps the one matter to which all sides of the religious exemption debate agree. *See* Michael W. McConnell, *Free*

the groundwork for the proposition that, even outside the free exercise context, neutral laws should normally be upheld against constitutional challenge.[4] Indeed, *Smith* has generated considerable controversy on other counts as well. It has been soundly criticized for its jurisprudential activism and disingenuousness,[5] and for the callousness that it extended to the rights of a vulnerable and often persecuted minority group—Native Americans.[6]

Closer analysis, however, might lead the civil libertarian to have some second thoughts before rejoicing about RFRA. Free exercise claims do not always present a one-sided controversy where only one civil liberty interest is at stake. For example, the pre-*Smith* free exercise claim rejected by the United States Supreme Court in *Bob Jones University v. United States*[7] involved the assertion that a religious organization should be entitled to discriminate on the basis of race. Similar claims have been advanced under RFRA: landlords objecting to open housing requirements on religious grounds have argued that RFRA provides them with a right to discriminate against prospective tenants.[8] RFRA then raises the age old problem that one person's civil liberty can be another person's civil restraint.[9]

Exercise Revisionism and the Smith *Decision*, 57 U. CHI. L. REV. 1109 (1990); Stephen Pepper, *Taking the Free Exercise Clause Seriously*, 1986 B.Y.U. L. REV. 299; William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991); James E. Ryan, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407 (1992). For this reason some have argued that the compelling interest standard in RFRA should be interpreted with greater stringency than was the case in the pre-*Smith* decisions. *See* Thomas C. Berg, *What Hath Congress Wrought: An Interpretive Guide to the Religious Freedom Restoration Act*, 39 VILL. L. REV. 301, 304-12, 328-29, 331-40 (1994).

4. *E.g.*, Cohen v. Cowles Media Co., 501 U.S. 663, 677 (1991) (Souter, J., dissenting).

5. The attacks on the jurisprudential aspects of *Smith*, particularly on its use of precedent, have been particularly strident. *See* James D. Gordon III, *Free Exercise on the Mountaintop*, 79 CAL. L. REV. 91 (1991); McConnell, *supra* note 3; Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1.

6. In this respect it is interesting to compare *Smith* with the Court's decision in Wisconsin v. Yoder, 406 U.S. 205, 234 (1972), where the Court went out of its way to protect the cultural integrity of the Amish. In contrast, *Smith* did little to protect the Native American culture. *See Smith*, 494 U.S. at 890; David C. Williams & Susan H. Williams, *Volitionalism and Religious Liberty*, 76 CORNELL L. REV. 769, 840-49 (1991); *see also* David E. Steinberg, *Religious Exemptions as Affirmative Action*, 40 EMORY L.J. 77, 97-101 (1991).

7. 461 U.S. 574, 604 (1983).

8. *See* Smith v. Commission of Fair Employment & Hous., 30 Cal. Rptr. 2d 395 (1994); Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274 (Alaska 1994).

9. For example, one possible application of RFRA would be to challenge public school curricula requiring textbooks which teach the value of toleration. *See* Ira C.

RFRA also presents civil rights concerns of another sort. The statute expressly grants exemption from governmental requirements only to those who claim that the governmental practice in question burdens their religious beliefs. But what of the case of the conscientious believer who objects to a governmental requirement on deeply-held nonreligious grounds? Is the exclusion of the nonreligious believer constitutionally permissible? Or, should RFRA be interpreted to grant exemption for nonreligious claims in order to assure equal treatment between religion and non-religion?

This article offers some preliminary observations about the statutory construction and constitutional issues raised by RFRA and the nonreligious believer. Part I introduces the issue by examining the conscientious objector provision of the Selective Service Act, which is another instance where Congress' failure to exempt nonreligious, as well as religious, claims was thought to raise important statutory and constitutional issues. Part II discusses the application of RFRA to nonreligious claims as a matter of statutory construction. Part III canvasses the constitutional issues that might arise if RFRA is interpreted to allow exemptions for only religious claims and concludes that excluding deeply felt nonreligious claims from RFRA's ambit raises serious constitutional concerns.

I. RELIGION AND NON-RELIGION—THE EXAMPLE OF *WELSH V. UNITED STATES* AND THE CONSCIENTIOUS EXEMPTION PROVISION OF THE SELECTIVE SERVICE ACT

To place the matters raised by RFRA and its relationship with nonreligious claims for exemption in perspective, it may be helpful to refer to a previous Supreme Court case which also addressed the application and constitutionality of a legislatively-granted, purportedly religion-only exemption from a neutral law. The statute in question was the conscientious exemption provision of the Selective Service Act[10] and the case was *Welsh v.*

Lupu, *Statutes Revolving in Constitutional Law Orbits*, 79 VA. L. REV. 1, 56 (1993). *Compare* Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058 (6th Cir. 1987) *with* Nomi M. Stolzenberg, *"He Drew A Circle that Shut Me Out": Assimilation, Indoctrination, and the Paradox of a Liberal Education*, 106 HARV. L. REV. 581 (1993). For further discussion of this issue, see George W. Dent, Jr., *Religious Children, Secular Schools*, 61 S. CAL. L. REV. 863 (1988).

10. The conscientious objector provision of the Selective Service Act provides an exemption to the requirements of the War and National Defense Military Selective Service Act, 50 U.S.C. app. § 462(a) (1988). The conscientious objector provision is codified under the Universal Military Training and Service Act, 62 Stat. 612-13

United States.[11]

The *Welsh* litigation began when Elliot Welsh II applied for conscientious objector status from the draft board.[12] The Selective Service's conscientious objector form required that the applicant sign a statement affirming that "by reason of religious training and belief, [the applicant was] conscientiously opposed to participation in war in any form."[13] Welsh, however, crossed out the reference to "religious training" in his application maintaining instead that his objection to war was based on "deep conscientious scruples against taking part in wars where people were killed."[14] The draft board was not impressed and denied Welsh's application, and the lower courts affirmed this decision.

The Supreme Court, however, reversed.[15] The Court resolved the matter by statutory construction without reaching the constitutional issue of whether the Selective Service Act's grant of exemption to only religious objectors was an unconstitutional preference for one form of belief. The Court majority held, in an opinion most cited for its efforts at defining "religion," that Welsh was entitled to conscientious objector status under the explicit language of the Act.[16] The Court stated:

> [Beliefs that] are purely ethical or moral in source and content

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(1948), and reads as follows:

> Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.

11. 398 U.S. 333 (1970)

12. *Id.* at 336.

13. *Id.*

14. *Id.* at 337. At his board hearing, Welsh described the nature of his beliefs as follows:

> I would like to reiterate that, though my beliefs are not religious in the conventional sense of my deriving the authority for such beliefs from a belief in God, they are certainly religious in the ethical sense of the word: that though I don't believe the "force" outside of man is an entity, I do certainly believe in a force beyond men's control, "the force of circumstance," if you will.

Letter from Elliot Ashton Welsh II, Defendant/Appellant, *Welsh v. United States*, to Chairman of Appeals Board, Southern California, Supreme Court Record 9 (October 13, 1965).

15. 398 U.S. at 343-44.

16. *Id.* at 343.

> but that nevertheless impose . . . a duty of conscience to refrain from participating in any war at any time . . . certainly occupy in the life of that individual "a place parallel to that filled by God" in traditionally religious persons. Because his beliefs function as a religion in his life, such an individual is as much entitled to a "religious" conscientious objector exemption . . . as is someone who derives his conscientious opposition to war from traditional religious convictions.[17]

Religion, in short, was to be defined functionally by reference to the strength of belief rather than by reference to the subject of that belief.[18] Such an approach, the Court asserted, would be most consistent with the congressional purpose underlying the Act. Because the purpose of the exemption was to excuse "from military service all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war," the Court concluded that all those individuals whose depth of belief met this definition should be exempted regardless of how the source of that belief was characterized.[19] Since it was uncontested that Elliot Welsh's beliefs were of this depth, the Court found he should be granted exemption from military service.[20] The holding in *Welsh* was clear if not consistent with the statutory language: The Selective Service Act's requirement that objector status be supported by "religious training and belief" should not be literally interpreted to mean "religious training and belief." The Act's mandate that conscientious objector status be denied to those whose objection to war was based on "political, sociological, or philosophical views" should not prohibit granting exemption to those whose objection to war was based on "political, sociological, or philosophical views."

Notwithstanding the *Welsh* majority's adroit statutory construction footwork,[21] the intent of the Court was obvious. The Court did not want to reach the constitutional issue and was

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17. *Id.* at 340.

18. *See*, Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056 (1978).

19. *Welsh*, 398 U.S. at 344.

20. *Id.*

21. *Cf.* Sullivan v. Hudson, 490 U.S. 877 (1989) (holding that the definition of "civil action" in the Equal Access to Justice statute extended beyond the plain meaning of the statute to include administrative proceedings); NLRB v. Catholic Bishop, 440 U.S. 490 (1979) (holding that the National Labor Relations Act would not be construed to grant board jurisdiction over church-run schools).

wary that construing the statute to deny Welsh's claim would be problematic. As Justice Harlan argued in his concurrence, granting exemption only to those who object to war on religious grounds could amount to an impermissible legislative preference in favor of religious belief.[22]

What, then, are the implications of *Welsh* for RFRA? Let us examine the following hypothetical. Assume that a landlord has a nonreligious belief system that parallels that of Welsh in both its depth and sincerity. Further assume that one of the tenets of this landlord's belief is that unmarried couples should not live together. On the basis of this conscientious belief, he therefore seeks a RFRA exemption from a fair housing ordinance which would otherwise prevent him from refusing to rent to unmarried couples. If it is assumed, as some lower courts have held,[23] that the RFRA claim against the fair housing law would prevail when brought by a religious objector, should RFRA also entitle our hypothetical nonreligious landlord to similar relief? Or, if RFRA is not interpreted to protect both the religious and nonreligious landlord, is it then unconstitutional?

II. STATUTORY CONSTRUCTION

As was the case in *Welsh*, our hypothetical case might be resolved by statutory construction. Religion under RFRA could be defined to include strongly held moral or philosophical objections. Such an interpretation, however, is unlikely. First, RFRA itself seems to demand a more narrow interpretation. The Act states that the "free exercise of religion" will have the same meaning it has under the First Amendment—a meaning which in at least some free exercise cases was held to not include secular moral or philosophical beliefs. For example, in *Wisconsin v.*

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22. *Welsh*, 398 U.S. at 357-61. Justice Harlan was also concerned that preconditioning exemption upon those whose beliefs are predicated on a relationship to a Supreme Being was also problematic in that it disadvantaged the religious adherents who did not worship a Supreme Being relative to those who did. *Id.*

23. *See, e.g.*, Smith v. Commission of Fair Employment and Hous., 30 Cal. Rptr. 2d 395 (1994) (holding that RFRA allows landlords to refuse to rent to unmarried couples if that refusal is based on religious beliefs); *cf.* Donahue v. Fair Employment & Hous. Comm'n, 2 Cal. Rptr. 2d 32 (Cal. Ct. App. 1991) (holding that the state interest in prohibiting discrimination against unmarried couples does not outweigh a constitutional (pre-*Smith*) free exercise claim), *review granted and opinion superseded*, 825 P.2d 766 (Cal. 1992), *review dismissed as improvidently granted and remanded*, 859 P.2d 671 (Cal. 1993). *But see* Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274 (Alaska 1994) (holding that preventing housing discrimination against unmarried couples constitutes a compelling state interest under RFRA).

Yoder the Court held that the free exercise exemption would apply only to the Amish and not to a group of followers of Henry David Thoreau who might object to compulsory education requirements on philosophical or moral grounds.[24] Similarly, in *Thomas v. Review Board* the Court held that a free exercise exemption from unemployment compensation requirements could not be applied to those whose objection was based upon philosophical or moral grounds.[25]

Second, the legislative purpose of RFRA might not be as easily construed as applying to nonreligious belief as was the legislative purpose of the Selective Service Act in *Welsh*. In *Welsh*, the Court construed the purpose of the conscientious objector provision as providing relief to those whose consciences would allow no rest if they were compelled to be an instrument of war.[26] The legislative history of RFRA, on the other hand, does not indicate that the congressional support for religion was based upon a concern for individual consciences. Rather, the support was clearly based upon Congress' rejection of the *Smith* Court's disregard of religious freedom interests. In its RFRA deliberations, Congress seemed more concerned with the protection of religion than with the protection of conscience.

Third, as a more practical matter, it can hardly be assumed that, given the current judicial reality, an expansive view of religion enveloping all matters of conscience is likely.[27] The policy implications of this type of holding are enormous. It would allow judicial intervention against governmental action on behalf of anyone who holds a strong philosophical or moral belief.[28]

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24. 406 U.S. 205, 216 (1972).

25. 450 U.S. 707, 719-20 (1981). Moreover, *Thomas* may be of particular significance in that the religious adherent's particular objection in that case parallels that of Elliot Welsh II; Thomas objected on the grounds that being compelled to work in an armaments factory (under threat of being denied unemployment compensation) was an affront to his conscientious objection to war. The vindication of this conscientious objection claim in *Welsh* and its denial in *Thomas* might then indicate that while the Court may be willing to adopt a broad statutory definition of religion, its constitutional definition is likely to be more circumscribed. Thus, to the extent RFRA demands that its definition of religion be tied to a constitutional anchor, the *Thomas* case suggests that the broad statutory construction of *Welsh* will not be available.

26. Welsh v. United States, 398 U.S. 333, 344 (1970).

27. Mark Tushnet, *The Constitution of Religion*, 18 CONN. L. REV. 701, 718 (1986).

28. Of course, even if RFRA were interpreted to apply only to religious claims for exemption, its effects on the implementation of legislative interests would be significant. *See*, Lupu, *supra* note 9, at 63; Marshall, *supra* note 3, at 312. In this regard, RFRA, even narrowly construed, will be problematic from the perspective of furthering legitimate state interests.

Of course, this does not mean that a broad statutory interpretation of religion is impossible. There are, after all, strong reasons to protect both religious and nonreligious conscience. The principle that a right of conscience is both fundamental and inalienable is deeply rooted in Western philosophy and legal thought.[29] Additionally, as the *Welsh* Court well recognized, compelling an individual to violate his conscience, may extract a painful psychological toll on the adherent[30] and a legislature may very well desire to avoid imposing this sort of burden on its citizenry. Interpreting RFRA to apply to matters of conscience is therefore sound policy.

Furthermore, if the issue is the proper interpretation of RFRA, the denial of free exercise protection for nonreligious beliefs in *Yoder* and *Thomas* is easily distinguishable as both cases address constitutional and not statutory language. As the Court has indicated in its Article III cases, statutory construction is only statutory construction—even if the words in the statute exactly replicate a constitutional provision.[31] Although RFRA's instruction that its provisions be interpreted by reference to the pre-*Smith* free exercise case law might suggest that religion should be defined narrowly (as in *Yoder* and *Thomas*), there still may be some room in the fluid process of statutory construction for the argument that "religion" should be interpreted to incorporate all conscientious claims.[32]

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29. *See, e.g.*, DAVID A. RICHARDS, TOLERATION AND THE CONSTITUTION 85 (1986); *see also* Rodney K. Smith, *Conscience, Coercion and the Establishment of Religion: The Beginning of an End to the Wanderings of a Wayward Judiciary?*, 43 CASE W. RES. L. REV. 917 (1993); MILTON R. KONVITZ, RELIGIOUS LIBERTY AND CONSCIENCE 99 (1968).

30. *Welsh*, 398 U.S. at 344.

31. *See, e.g.*, Merrell Dow Pharmaceuticals Inc. v. Thompson 478 U.S. 804 (1986). For an account of the interplay between constitutional interpretation and the interpretation of statutory provisions that purport to adopt constitutional norms, see Lupu, *supra* note 9.

32. An argument could be made that even *Yoder* and *Thomas* do not definitively rule out the possibility that a constitutional definition of free exercise of religion could apply to philosophical or moral beliefs. First, despite its dicta in the two cases, the Court has never formally held that the constitutional definition of religion does not apply to strongly held philosophical and moral beliefs. Second, there is some, albeit limited, authority which arguably supports the contention that the constitutional definition of religion might apply to nonreligious beliefs. In *Torcaso v. Watkins*, for example, the Court held that a Maryland law requiring one to profess his or her belief in God to receive a notary public commission, violated an atheist's right of free exercise. 367 U.S. 488, 495 (1961). The Free Exercise of Religion Clause, according to the Court, protected the atheist's right of nonbelief. *Id.* (relying on *Torcaso* for the general proposition that all deeply-held nonreligious beliefs implicate the free exercise of religion may be a stretch. The nonbelief in God that was the issue in *Torcaso* is

Finally, the claim for a broad interpretation of religion might be sustained if it is shown that a more narrow interpretation would lead to constitutional invalidation. In such a circumstance, the Court might be willing, as it was in *Welsh*, to engage in broad statutory construction in order to avoid the constitutional issue.[33]

The question, therefore, is whether RFRA's potential application to only religious adherents violates the Constitution. Or to put the matter in the context of our hypothetical, does RFRA's failure to provide protection to the nonreligious landlord run afoul of constitutional constraints?

III. THE CONSTITUTIONAL ISSUES

RFRA, if interpreted to apply to only religious claims for exemption, faces three potential avenues of constitutional attack. Those challenges involve: (1) the Establishment Clause; (2) the Equal Protection Clause; and (3) the Free Speech Clause. Before reaching the substance of those issues, however, a preliminary inquiry is in order. What implications, if any, does the *Smith* decision have in an assessment of RFRA's constitutionality?

A. The Implications of Smith

A strong case might be made that *Smith* supports RFRA's constitutionality. Such an argument would stem from no less authority than the case itself.[34] Justice Scalia's majority opinion in *Smith* specifically stated that legislative accommodation of religion would be permissible.[35] Indeed, he advocated that religious organizations should pursue relief from neutral laws of general application through the legislatures rather than through the courts.[36] Thus, it might be argued that *Smith* explicitly presumes the legality of measures like the Religious Freedom Restoration Act.[37]

There are several weaknesses in this argument. First, the

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more easily characterized as "religious" than is a philosophical or moral belief which does not pertain to the existence or the non-existence of a Deity).

33. *Cf.* NLRB v. Catholic Bishop, 440 U.S. 490 (1979) (holding that, in order to avoid the constitutional question, the National Labor Relations Act would not be construed to grant Labor Board jurisdiction over church-run schools).

34. Employment Div. v. Smith, 494 U.S. 872, 890 (1990).

35. *Id.*

36. *Id.*

37. *See* Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555, 573-74 (1991).

question of the legality of religious exemptions was not before the Court in *Smith*, and therefore Justice Scalia's statements constitute pure dicta. Second, Justice Scalia's views on the constitutionality of religious exemptions have not commanded a majority of the Court. For example, in *Texas Monthly v. Bullock*[38] the Court struck down a religious-based exemption from sales tax requirements over a vigorous Scalia dissent.[39] As *Bullock* indicates, Justice Scalia apparently has a more deferential approach to legislative grants of exemption than do other members of the Court.

Third, and most importantly, *Smith* suggests that legislatively-granted exemptions are less likely to survive constitutional scrutiny. *Smith*, despite its dicta, effectively changes the presumption as to the constitutionality of legislative grants. Prior to *Smith*, one could argue that the Constitution demanded some accommodation from general laws of neutral applicability for free exercise interests. Legislative exemptions from neutral laws, which provided this accommodation, could therefore be defended as in accord with this constitutional mandate. The denial of the free exercise right in *Smith*, however, suggests that exempting religion from neutral laws is no longer based upon a constitutional requirement. Accordingly, after *Smith*, the strength of the state interest supporting the legislative exemption is necessarily diminished.

For similar reasons, reliance on the pre-*Smith* cases as support for the permissibility of granting exemptions from neutral laws is also undercut by *Smith*. While, as noted in part II, the *Yoder* and *Thomas* cases indicated that only religious claimants would be entitled to free exercise exemptions from neutral laws, the decisions in both cases were explained as deriving from a constitutional mandate—the Free Exercise Clause. The favoritism towards religion recognized by *Thomas* and *Yoder* was allegedly demanded by the Constitution itself.[40]

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38. 489 U.S. 1 (1989).

39. *Id.* at 29-45. Justice Scalia argued that sales tax exemptions for the sale of religious literature did not violate the Establishment Clause because they did not demonstrate impermissible governmental favor toward religion, but merely accommodated a public service. *Id.*

40. Whether *Yoder* and *Thomas* would, in any event, be authority for the proposition that a statute may constitutionally distinguish between religion and non-religion is debatable. That a constitutional provision may distinguish between religion and non-religion is not conclusive in interpreting whether a particular statute may engage in a similar distinction. *Cf.* Welsh v. United States, 398 U.S. 333, 344-67 (1970) (Harlan, J. concurring).

Smith, however, rejected this constitutional understanding. By holding that the Free Exercise Clause does not require exemptions for religious claimants, the decision refutes the argument that religious claims are constitutionally privileged.[41] The result is that *Smith* effectively negates any contention that RFRA should come before the courts with a special presumption of validity. After *Smith*, legislative exemptions for religion hold no special or greater claim for constitutionality than do other forms of legislative exemptions.[42] It is in this light that the constitutionality of RFRA should be assessed.

B. The Establishment Clause

The most logical place to begin analyzing RFRA's constitutionality is the Establishment Clause—the clause which theoretically prohibits government efforts to improperly advantage or favor religion.[43] Because RFRA benefits religion exclusively, it might therefore be thought to immediately raise an establishment issue. Certainly, it would appear that RFRA might not survive a mechanical application of the Court's announced Establishment Clause test. That test, as set forth in the case *Lemon v. Kurtzman*,[44] requires that in order to avoid the establishment prohibition, a challenged enactment: (1) must have a secular purpose; (2) must have a primary effect that neither advances nor inhibits religion; and (3) must not foster impermissible state entanglement with religion.[45] RFRA arguably violates both the secular purpose and primary effect requirements of this test since it is clearly designed to benefit religion and would likely have the effect of doing so.[46] *Lemon*, however, is notorious for

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41. *See* Marshall, *supra* note 3.

42. Indeed, because religious exemptions involve religion, they raise a constitutional objection that other types of legislative exemptions do not—the Establishment Clause. *See infra* notes 43-83 and accompanying text.

43. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38 (1985) (holding unconstitutional a statute encouraging public schools to allot a minute each day for voluntary prayer because the purpose of the statute was to promote religion); Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (holding that to avoid violating the Establishment Clause, a statute must "have a secular legislative purpose, . . . must be one that neither advances nor inhibits religion, . . . [and] must not foster 'an excessive government entanglement with religion.'") (citations omitted); Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963) (holding devotional Bible reading in public schools unconstitutional because its purpose was to further religion).

44. 403 U.S 602 (1971).

45. *Id.* at 612-13.

46. *But see* Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987).

its lack of coherent application[47] and is seldom, if ever, mechanically applied.[48] Thus, the possibility that RFRA might not survive a mechanical application of *Lemon* is probably of little relevance.

A more fruitful area of investigation might refer to the cases in which the Court has reviewed the constitutionality of legislatively-granted religious exemptions. The Court's record in these cases, however, is again spotty.[49] On one side, for example, in *Walz v. Tax Commission of New York*[50] the Court upheld New York's property tax exemption for religious groups even though that exemption provided substantial financial benefit to religious organizations.[51] Similarly, in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*[52] the Court found a constitutional provision in Title VII which exempted only religious organizations from complying with anti-

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47. Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 118 (1992) ("The Court has tended to address [Establishment Clause] problems one clause at a time, building up inconsistencies often without seeming to notice them."); School Dist. v. Ball, 473 U.S. 373, 385 (1985) ("Establishment Clause jurisprudence is characterized by few absolutes."). Justice Scalia has been particularly vehement in denouncing *Lemon*:

> Like some ghoul in a late-night horror movie that repeatedly sits up in a grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence . . . . Over the years, however, no fewer than five of the currently sitting Justices, have . . . personally driven pencils through the creature's heart . . . . For my part, I agree with the long list of constitutional scholars who have criticized *Lemon* and bemoaned the strange Establishment Clause geometry of crooked lines and wavering shapes its intermittent use has produced.

Lamb's Chapel v. Center Moriches Sch. Dist., 113 S. Ct. 2141, 2150-51 (1993) (Scalia, J., joined by Thomas, J., concurring) (citing Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools—An Update*, 75 CAL. L. REV. 5 (1987); William P. Marshall, *"We Know it When We See it": The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495 (1986); Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1; Philip B. Kurland, *The Religion Clauses and the Burger Court*, 34 CATH. U. L. REV. 1 (1984); R. CORD, SEPARATION OF CHURCH AND STATE (1982); Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673 (1980) (other citations omitted)).

48. In some cases, the Court does not even cite the *Lemon* test. *See* Marsh v. Chambers, 463 U.S. 783 (1983); *see also* Zobrest v. Catalina Foothills Sch. Dist., 113 S. Ct. 2462 (1993); Lee v. Weisman, 112 S. Ct. 2649 (1992). For an account that *Lemon* has been effectively overruled, see Michael S. Paulsen, Lemon *is Dead*, 43 CASE W. RES. L. REV. 795 (1993).

49. Lupu, *supra* note 37, at 564-65.

50. 397 U.S. 664 (1970).

51. Part of the *Walz* rationale does not work to support the cause of RFRA. The Court's upholding of the property tax exemption was in part influenced by the fact that the exemption was available to comparable nonreligious groups such as educational and charitable institutions. *Id.* at 672-73, 675.

52. 483 U.S. 327 (1987).

discrimination requirements.[53]

In other cases, however, the Court has invalidated legislatively-mandated accommodations for religious practice. Thus, in *Texas Monthly v. Bullock, Inc.*[54] the Court invalidated a sales tax exemption for the sale of religious materials. The *Texas Monthly* court found the exemption amounted to an improper government subsidy for those desiring to disseminate a religious message. Likewise, in *Estate of Thornton v. Caldor, Inc.*,[55] the Court struck down a measure which required employers to allow their employees to stay home on the day they designated as their Sabbath. According to the Court, the law held two infirmities. First, it benefitted only one type of religion—that which had a day of Sabbath.[56] Second, the law provided no accommodation for the possible hardship imposed upon the employers who had to accommodate their employees' religious exercise.[57]

What is absent, of course, from this recitation of cases is some basis for the Court's distinctions. This is not an oversight. Establishment Clause jurisprudence is legendary for its failure to provide a theoretical underpinning[58]—and that deficiency is amply demonstrated in the inconsistencies that pervade the Court's results.[59] The exemption cases are no exception.

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53. The statute under attack in *Amos*—42 U.S.C. § 2000e-1 (1988)—allowed religious organizations to discriminate in employment on the basis of religious affiliation.

54. 489 U.S. 1 (1989).

55. 472 U.S. 703 (1985).

56. *Id.* at 709-10.

57. *Id.* at 710.

58. *See, e.g.*, Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 674-75 (1980) (arguing that the "Court's separate tests for the Religion Clauses have provided virtually no guidance" and that the Court has not adequately explained the conflict between the clauses and such tests); Philip E. Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CAL. L. REV. 817, 819 (1984) ("Many areas of constitutional law are unsettled, of course, but in most areas the uncertainty concerns how far the Constitution requires us to go in a particular direction. In the religion clause area, even the general direction is often difficult to ascertain.").

59. *See* Meek v. Pittinger, 421 U.S. 349 (1975) (upholding a textbook loan provision of the challenged statute, but striking the loans of instructional materials and equipment); *see also* Board of Educ. v. Allen, 392 U.S. 236 (1968) (upholding a textbook loan program). *Compare* Abington School Dist. v. Schempp, 374 U.S. 203 (1963) (striking down Bible reading in classroom) *and* Engel v. Vitale, 370 U.S. 421 (1962) (holding New York's use of a prayer in the classroom unconstitutional) *with* Marsh v. Chambers, 463 U.S. 783 (1983) (upholding Nebraska's practice of opening state legislative sessions with the prayers of a paid chaplain); *compare* Stone v. Graham, 449 U.S. 39 (1980) (striking down a Kentucky statute authorizing the posting of the Ten Commandments in public school classrooms) *with* Lynch v. Donnelly, 465 U.S. 668, 676-77 (1984) (dictum) (painting of the Ten Commandments in the United States

Nevertheless, some general observations are possible. On the one hand, the fact that, in our hypothetical, the religious landlord is exempted from regulatory compliance argues in favor of RFRA's constitutionality. As Douglas Laycock has argued, "The state does not support or establish religion by leaving it alone."[60] Also working on behalf of RFRA's constitutionality, at least as applied in our landlord hypothetical, is that it does not involve any form of financial subsidy.[61] Exempting only the religious landlord from open housing requirements, therefore, does not trigger the concerns raised by other exemptions which more directly free up the resources of religious organizations allowing them a competitive advantage in disseminating their message and in exerting their influence.[62]

The exemption may also survive constitutional scrutiny because it is directly tied to the free exercise interests of the claimant and therefore avoids the Establishment Clause concern with appearance of improper government endorsement of religion.[63] According to Justice O'Connor, the author of the "endorsement" test, legislative accommodations that reflect free exercise interests will not normally be considered unconstitutional because they do not send the forbidden message of impermissible state support of religion.[64] Indeed, under this generalized

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Supreme Court was constitutional); *compare* Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973) (holding that New York's tuition reimbursement program allowing tax grants and credits to qualifying parents sending children to parochial school was unconstitutional) *with* Mueller v. Allen, 463 U.S. 388 (1983) (upholding tax deductions for parents of non-public school children); *compare Meek*, 421 U.S. at 370-73 (holding counselling and training services by public employees on parochial school grounds creates impermissible church-state entanglement) *with* Wolman v. Walter, 433 U.S. 229, 244-48 (1977) (holding state therapeutic and counselling services are constitutional when they do not take place on parochial school grounds).

60. Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1416 (1981); *see also* William P. Marshall & Douglas C. Blomgren, *Regulating Religious Organizations Under the Establishment Clause*, 47 OHIO ST. L.J. 293, 329-31 (1986).

61. *See* Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 8-17 (1989) (holding that an exemption from state sales tax requirements for religious publishers is unconstitutional as an impermissible government subsidy of religion under the Establishment Clause).

62. *Id.*; William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE W. RES. L. REV. 357, 399-400 (1989-90).

63. *See* County of Allegheny v. American Civil Liberties Union, 492 U.S. 573 (1989) (holding that a nativity scene included in a display on courthouse steps that included the Jewish menorah impermissibly endorsed a Christian message); Lynch v. Donnelly, 465 U.S. 667 (1984) (O'Connor, J. concurring) (contending that a nativity scene displayed among secular holiday symbols did not violate the Establishment Clause because it did not endorse Christianity).

64. Wallace v. Jaffree, 472 U.S. 38, 74-76 (1985) (O'Connor, J., concurring) Jus-

"endorsement" inquiry, whether RFRA is found to be violative of the Establishment Clause may well be case-specific; and an argument could be made in our hypothetical case that allowing a landlord to refuse to rent to unmarried couples based upon the latter's religious belief is not endorsement.[65]

On the other hand, the sheer breadth of the scope of the religious exemption in RFRA may portend its unconstitutionality. As Laurence Tribe has written, "unbounded tolerance of governmental accommodation [of religion] in the name of free exercise neutrality could eviscerate the Establishment Clause."[66] RFRA, if nothing else, is certainly "unbounded." The breadth of RFRA is also troublesome from another perspective. As Michael McConnell has written, one of the most important reasons supporting the constitutionality of some legislative accommodations of religion is that "the government is in a better position than the courts to evaluate the strength of its own interest in governing without religious exceptions."[67] RFRA, however, does not allow for this sort of deference to the government's weighing of its own interests. Rather, RFRA demands that the government interest be tested against the religious claim in all circumstances. Thus, RFRA lacks both the precision and the considered legislative judgment that might serve to sustain more limited

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tice O'Connor stated:

> The solution to the conflict between the Religion Clauses lies not in "neutrality," but rather in identifying workable limits to the government's license to promote the free exercise of religion . . . . It is disingenuous to look for a purely secular purpose when the manifest objective of a statute is to facilitate the free exercise of religion by lifting a government-imposed burden. Instead, the Court should simply acknowledge that the religious purpose of such a statute is legitimated by the Free Exercise Clause.

Id. at 83. The Court's abandonment of the constitutionally-compelled free exercise exemption in *Smith*, however, may weaken the claim that deference to free exercise concerns will avoid the appearance of endorsement. *See supra* notes 34-42 and accompanying text.

65. *But see infra* notes 70-72 and accompanying text. Of course, given the pervasive subjectivity of the endorsement inquiry, any answer to the endorsement question would be significantly less than precise. *See* Steven D. Smith, *Symbols, Perceptions and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266, 267 (1987) ("Far from eliminating the inconsistencies and defects that have plagued establishment analysis, the 'no endorsement' test would introduce further ambiguities and analytical deficiencies into the doctrine."); McConnell, *supra* note 47 (observing that the endorsement test is necessarily subjective).

66. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1195 (1988); *cf.* Estate of Thornton v. Caldor, 472 U.S. 703, 710 (1985).

67. Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 31, *noted in* TRIBE, *supra* note 66, at 1195 n.44.

government grants of exemption.

From an endorsement test perspective, RFRA may also be troublesome. Despite the statute's tie to free exercise concerns, the fact that RFRA extends across-the-board protection to religion might easily be viewed as an improper endorsement. It suggests an "unyielding weighting" by the government in favor of religion.[68] Moreover, even if the endorsement inquiry were limited to case-specific applications of RFRA rather than to the appearance of endorsement created by the statute on its face,[69] RFRA may be problematic. The argument that exempting the landlord from anti-discrimination requirements is not endorsement triggers a serious response. Affirming a religious right to trump anti-discrimination requirements bestows a legitimacy and credibility upon the religious claim that suggests at least some measure of endorsement.[70]

Finally, the application of RFRA in our housing discrimination hypothetical raises one other concern. Legislatively granted religious exemptions may be defended in certain circumstances as measures to avoid regulatory entanglement between church and state.[71] This argument, however, while available when the party receiving the grant is a religious institution,[72] is inapplicable in the case of the individual claimant. The application of RFRA to the benefit of only the religious landlord in our hypothetical case, then, does raise serious Establishment Clause concerns.

C. Equal Protection

RFRA may have an even more difficult time under an equal protection analysis. Although the level of scrutiny that the Court would apply in reviewing a provision which purportedly discriminates against non-religion is not clear,[73] the religion/non-reli-

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68. Estate of Thornton, 472 U.S. at 710.

69. *Cf.* Bowen v. Kendrick, 487 U.S. 589 (1988).

70. Marshall, *supra* note 3, at 322-23.

71. *See* TRIBE, *supra* note 66, at 1198.

72. *Cf.* NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979) (avoiding church-state entanglement requires reading the National Labor Relations Act as exempting religious schools from Board purview).

73. Despite the concern that has been presented for non-religion in the Establishment Clause cases, (*cf.* Wallace v. Jaffree, 472 U.S. 38, 69-71 (1985) (O'Connor, J. concurring); *Torcaso v. Watkins*, 367 U.S. 466 (1961)) it might be hard to characterize non-religion as a suspect class triggering strict scrutiny. *But see* City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (applying strict scrutiny to racial discrimination against whites). It is also possible that the exercise of deeply-held beliefs could

gion distinction in RFRA may not survive even a rational basis inquiry:[74] is there a legitimate basis for distinguishing between deeply held religious and nonreligious beliefs?[75]

The basis of such a distinction would be hard to maintain.[76] If both the religious landlord and the secular landlord are equally motivated by deeply held beliefs, then there is no satisfactory answer why one, but not the other, should be entitled to a statutory exemption; that is indeed the lesson of *Welsh*. As no less an ardent defender of religious freedom than Steven Smith has acknowledged,[77] virtually all the reasons which have been offered in support of the protection of religious belief could also be applied to nonreligious belief.[78] To Smith, the only basis for distinguishing between religion and non-religion is an affirmative commitment to the promotion of religion—a matter he terms the

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be construed as a fundamental right on grounds that it comprises a part of the individual's "basic autonomy of identity and self-creation." *Cf.* Alan E. Brownstein, *Harmonizing the Heavenly and Earthly Spheres: The Fragmentation and Synthesis of Religion, Equality, and Speech in the Constitution*, 51 OHIO ST. L.J. 90, 95 (1990).

74. *See* Milwaukee Montessori Sch. v. Percy, 473 F. Supp. 1358 (E.D. Wis. 1979) (invalidating a program which benefitted religious but not nonreligious schools).

75. This, of course, is the exact question raised, and so skillfully avoided, in *Welsh*. *See supra* discussion part I.

76. *See* Norman Dorsen, *The Religion Clauses and Nonbelievers*, 27 WM. & MARY L. REV. 863, 871 (1986) ("[W]hen the government acts on the basis of religion it discriminates against those who do not 'believe' in the governmentally-favored manner."); Lupu, *supra* note 37, at 591-92 (arguing that any distinction between religious association and nonreligious association is impermissible).

77. Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149 (1991); *see also* Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience, The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245 (1994).

78. Smith, *supra* note 77, at 197:

> [T]wentieth century courts and commentators have offered a variety of potential nonreligious successors to the religious justification . . . . [T]he civic virtue rationale argues that religion deserves special constitutional protection because it instills in citizens the moral values or traits of character necessary in a democratic social order; the personal autonomy rationale asserts that religious freedom is warranted because of the importance of religion to matters of personal choice and identity; the pluralism rationale emphasizes the importance of religious freedom in ensuring a diversity of faiths, thereby strengthening American pluralism; the civil strife rationale argues that religious freedom is valuable in helping to curb the dissension and social conflict that issues of religion have historically provoked; and the nonalienation rationale suggests that religious freedom helps to avoid offending citizens who adhere to minority religious faiths or to none at all, thus helping all citizens to feel like full members of the political community.

See also John H. Garvey, *Free Exercise and the Values of Religious Liberty*, 18 CONN. L. REV. 779, 779-82 (1986).

"religious justification."[79]

A religious justification, however, holds problems of its own, particularly when offered as a constitutional defense to a statutory enactment. First, it is problematic under the Establishment Clause because it explicitly indicates that the statute's purpose is an affirmative government endorsement of religion.[80] Second, it offends Speech Clause principles because it suggests an improper constitutional hierarchy among types of beliefs.[81]

A better case for distinguishing between religion and nonreligion might be made when a religious organization seeks the claim for exemption. In those circumstances, the interest in protecting the autonomy of religious institutions and in avoiding problems of church-state entanglement might allow for some permissible basis of distinction between religion and non-religion.[82] With respect to the claims of the individual religious believer, however, such a concern is not a factor.[83] RFRA's failure to exempt the nonreligious landlord may violate the Equal Protection Clause.

D. The Free Speech Clause

The final basis for the constitutional attack on RFRA is the Free Speech Clause. Unlike the establishment and equal protection inquiries, however, the availability of the free speech challenge is limited. Any claim that RFRA's failure to extend to nonreligious activities violates the Free Speech Clause depends upon

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79. *Smith*, *supra* note 77, at 197.

80. *See* Wallace v. Jaffree, 472 U.S. 38 (1985).

81. *See* Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975); Dorsen, *supra* note 76, at 871; Marshall, *supra* note 3, at 319-323.

82. Laycock, *supra* note 60; TRIBE, *supra* note 66; *cf.* Carl H. Esbeck, *Establishment Clause Limits on Governmental Interference with Religious Organizations*, 41 WASH. & LEE L. REV. 347 (1984).

83. Less problematic from an equal protection perspective would be to grant exemption for beliefs that are strongly held and to deny exemption for those that are only nominally held. *See* Welsh v. United States, 398 U.S. 333, 342-43 (1970) (distinguishing between deeply-felt and nominally-held beliefs); *see also* Eisgruber & Sager, *supra* note 77. This is not a distinction, however, which can easily be thought to fit within a religion/non-religion dichotomy. Some religious beliefs may be deeply held while others may be accepted simply by rote or habit.

Investigating whether beliefs are deeply held, of course, creates its own problems. *See* United States v. Ballard, 322 U.S. 78 (1944) (inquiry into religious sincerity is problematic); Employment Div. v. Smith, 494 U.S. 872, 887 (1990) (inquiry into religious centrality is not within the "judicial ken") (quoting Hernandez v. Commissioner, 490 U.S. 680, 699 (1989)).

whether those activities could be fairly characterized as implicating free speech protection.

In some circumstances, the speech contention would be easily available. For example, a claim for exemption from solicitation and literature distribution regulations clearly implicates the Free Speech Clause.[84] In such a case, the granting of an exemption for only religious adherents would violate the seminal First Amendment principle that there is an equality in the realm of ideas.[85] If RFRA were interpreted to allow the religious speaker the right to solicit funds and distribute literature in circumstances where the nonreligious speaker would be denied this right, it should surely be struck down.[86]

Although the law seems clear in this area,[87] there is a trap for the unwary inherent in the application of RFRA's compelling interest test. Because the class of religious speakers is likely to be more limited in number than the class of all speakers, the state's interest in proscribing the expression of only religious claimants may not be deemed as compelling as when measured against the class of all speakers. For example, if the state's interest behind an anti-solicitation rule is in deterring the potential fraud often associated with face-to-face solicitation, this interest would not be as seriously compromised if only religious solicitors were exempt from the state regulation as it would be if all potential fund-raisers were exempt from this rule. An attack on the anti-solicitation rule, then, is more likely to prevail when articulated as a RFRA free exercise claim than when it is presented as a First Amendment speech claim benefitting both religious and nonreligious speakers. If for this reason, a RFRA claim prevailed while a Free Speech Clause claim did not, the result would be a de facto content-based speech dichotomy in favor of religious speech.[88]

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84. *E.g.*, Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640 (1981).

85. *See* Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972).

86. *See Heffron*, 452 U.S. 640 (denying greater constitutional protection to religious as opposed to nonreligious expression); Prince v. Massachusetts, 321 U.S. 158 (1944) (same).

87. The legislative history of RFRA indicates that Congress as well was aware that religious speakers should not be accorded special protection: "[W]here religious exercise involves speech, as in the case of distributing religious literature, reasonable, time, place and manner restrictions are permissible consistent with First Amendment jurisprudence." S. REP. NO. 111, 103d Cong., 1st Sess. 13 (1993), *reprinted* in 1993 U.S.C.C.A.N. 1892, 1903.

88. This is what actually happened in the litigation leading up to Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640 (1981). Balancing the right of religious adherents to distribute religious material at the State Fair against the

Such a result is not improbable given the dynamic of RFRA litigation because it is quite possible that the speech implications of any RFRA attack may never be introduced into the case. Who is likely to present the issue? The RFRA plaintiff, of course, wants only relief for herself and is unlikely to want to raise the broader First Amendment claim. On the other side, the government attorney defending the anti-solicitation requirement may not want, for obvious reasons, to concede that the challenged statute might also infringe on the free speech interests of many individuals or organizations. And in many cases, both parties may simply overlook the issue—particularly in cases where the speech implications of the RFRA claim are not immediately obvious.[89]

In other instances, however, speech protection may not be at issue. In our hypothetical case, for example, in order for the Speech Clause to be implicated, a court must hold that the desire not to rent to an unmarried couple raises a speech interest.[90] If this were so, then the legislative grant exempting only

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state's interest in curbing congestion and inhibiting fraud by enforcement of a booth rule, the Minnesota Supreme Court ruled in favor of the religious adherents on grounds that exempting a limited number of religious adherents from the booth requirements would not seriously compromise the state's interest. International Soc'y for Krishna Consciousness v. Heffron, 299 N.W.2d 79 (Minn. 1980). Recognizing that the Minnesota Supreme Court decision effectively created an improper content-based regulation in favor of religious speech, the United States Supreme Court reversed. *Heffron*, 452 U.S. at 652-53.

89. For example, see Christians v. Crystal Evangelical Free Church, 152 B.R. 939 (Bankr. D. Minn. 1993) [currently on appeal before the Eighth Circuit]. In that case, a religious individual is claiming that RFRA protects an individual's right to tithe monies being sought by a bankruptcy trustee. Arguably, however, a parallel speech claim could be made by any person who by matter of conscience wished to donate funds to a nonreligious entity such as an environmental or human rights organization. Because the speech aspects of the case are not immediately visible, however, it is unclear whether they will be pursued or addressed. Underlying speech rights are also at issue in other current RFRA litigation such as *American Life League Inc. v. Reno*, which is currently before the Fourth Circuit. 855 F. Supp. 137 (E.D. Va. 1994) (challenging the Freedom of Access to Clinic Entrances Act as a violation of RFRA for those with religious objections to abortion).

90. This would require a creative reading of cases such as *Wooley v. Maynard*, 430 U.S. 705 (1977) and *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) which held respectively that the requirements of displaying the motto "Live Free or Die" on one's license plate and saluting the flag were impermissible under the Free Speech Clause. In both cases the Court was concerned that the requirements at issue amounted to coerced expression. In the landlord hypothetical, it could similarly be argued that the forced renting to an unmarried couple compelled the landlord to send a message of approval of cohabitation—a message to which he strongly disagreed. Such an argument, however, is unlikely to succeed. *See* United States v. O'Brien, 391 U.S. 367 (1968) (free speech is not implicated merely because a person wishes to express an idea).

the religious but not the nonreligious claimant would raise a Free Speech Clause concern. The more likely interpretation, however, is that the failure to lease to an unmarried couple would not be considered speech, and therefore the Free Speech Clause would not apply. In sum, depending on the circumstance, the Free Speech Clause raises either the strongest or the weakest constitutional challenge to the RFRA exemption.

CONCLUSION

The constitutional attacks on RFRA for potentially failing to include protection for those who object to neutral laws on deeply-felt nonreligious grounds are substantial. It might be tempting to follow the course adopted in *Welsh* and to broadly construe the statutory meaning of religion in RFRA in order to avoid the constitutional attack. However, as a matter of statutory construction, such an approach would be a stretch and might lead to congressional revocation. In passing RFRA, it is unlikely Congress was interested in fashioning a general right of conscience.

On the other hand, refusing to protect nonreligious beliefs is problematic from a policy standpoint as well as from a constitutional perspective. Why should religion be privileged? Why should those who base their objection to government actions on deeply-felt moral or philosophical convictions be forced to choose between state law and their consciences, while those who hold only nominal adherence to religious precepts be exempted from the very same law?

Finally, it is notable that the arguments in favor of the constitutionality of RFRA's distinguishing between religion and nonreligion are strongest when the claimant seeking exemption is a religious institution rather than an individual.[91] If this observation is indeed correct, it suggests that when the constitutionality of RFRA applications are played out in the courts, institutional RFRA claims will likely succeed while individual RFRA claims will fail. Such a result, scholars such as Ira Lupu would argue, is directly antithetical to an appropriate understanding of the religion clauses[92] and, most would agree, is at the least ironic from

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It might also be argued that the anti-discrimination requirements infringe the landlord's right of association. This argument, as well, is unlikely to prevail. Roberts v. United States Jaycees, 468 U.S. 609 (1984) (compelled admission of women to men's association does not violate the First Amendment); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (students sharing a common residence do not implicate associational rights).

91. *See supra* notes 73-74, 85-86 and accompanying text.

a civil liberties point of view. The thought of RFRA as a haven for individual liberties may be short-sighted.

92. Ira C. Lupu, *Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination*, 67 B.U. L. REV. 391 (1987).